



1 This 27<sup>th</sup>, day of January, 2005.  
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4 **Agreed and Consented to By:**

5 

6 Michael R. Johnson, Sr.  
7 Attorney for the Plaintiff  
8 Georgia Bar No. 395056  
9 Johnson & Associates, P. C.  
10 340 West Peachtree Street, N.E.  
11 Suite 200  
12 Atlanta, Georgia 30308  
13 (404) 688-7100  
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25

**Agreed and Consented to By:**



Tony L. Ware, JD, Plaintiff  
Chairman & CEO  
1033 Kipling Street S.E.  
Atlanta, Georgia 30315-7030  
(404) 945-0342



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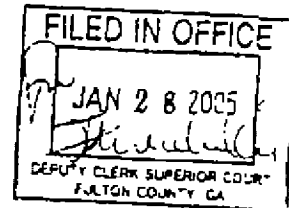
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1 Defendant FleetBoston is a foreign corporation having withdrawn from doing  
 2 business in this State pursuant to O C G A § 14-2-1520(b). After proper service of  
 3 process of the Summons and Complaint on December 10<sup>th</sup>, 2004 on the Defendant  
 4 by a Court Appointed Process Server, the Defendant failed to file its answer to the  
*Summons and Complaint and became in default on January 11<sup>th</sup>, 2005*

5 The Court finds that fifteen (15) days having elapsed from the date of this  
 6 default and the default not having been opened as a matter of right or by an order of  
 7 this Court and hence the Plaintiffs are clearly entitled to a judgment by default  
 8 against the Defendant as a matter of law. The Plaintiffs has submitted to the Court  
 9 their joint Motion for Default Judgment and Summary Judgment on the issue of  
 10 damages with stipulations filed by the parties Plaintiffs. The Court finds that there are  
 11 no just reasons for delay of the entry of this final judgment and therefore enters final  
 judgment for the Plaintiffs as to all claims pursuant to O C G A § 9-11-54(b)

## 12 **II. DISCUSSION**

13 There is no dispute that Defendant FleetBoston is a foreign corporation  
 14 withdrawn from doing business in this State pursuant to O C G A § 14-2-1520(b).  
 15 See, (Plaintiffs' Complaint Exhibit "A") and that proper service of process was made  
 16 on the Defendant by a Court Appointed Process Server by serving the Georgia  
 17 Secretary of State pursuant to O C G A § 14-2-1520(c). See, Return of Service at  
 18 Docket No. E4. Defendant failed to file its answer to the Summons and Complaint  
 19 and became in default on January 11<sup>th</sup>, 2005. The Plaintiffs having filed their joint  
 20 Motion for Default and Summary Judgment on the issue of Damages, such motion  
 can be heard by the Court. Therefore, the Court holds that since Defendant is in  
 default liability is established by the operation of law. See, O C G A § 9-11-55(a)

## 21 **III. HEARING ON THE ISSUE OF DAMAGES**

22 The only issue that remain in this civil action are the issue of damages. With  
 23 the consent of the Plaintiffs, the Court will entertain their joint Motion for Default  
 24 Judgment and Summary Judgment on the issue of damages. Defendant has legally  
 25 waived all further notices in this action pursuant to O C G A § 9-11-5(a). Defendant  
 is not entitled to any notice of the final hearing on the Plaintiffs' joint motion

1 There has been a long line of cases rendered by our Georgia Supreme Court  
 2 which holds that the failure of a Defendant to file pleadings in an action is deemed a  
 3 waiver by that Defendant of all further notices to that Defendant in the civil action.  
 4 This includes all notices of time and place of trial and the issuing of any final decree  
 5 in the action. See, Lucas v. Lucas, 273 Ga. 240, 539 SE2d 807 (2000), Harris v.  
 6 Harris, 258 Ga. 496, 371 SE2d 399 (1988), Hardwick v. Hardwick, 245 Ga. 573,  
 266 SE2d 184 (1980), Brooks v. Brooks, 242 Ga. 444, 249 SE2d 244 (1978).

7 Thus, this waiver of further notices of a hearing and the time and place of trial  
 8 provided by O.C.G.A. § 9-11-5(a) would control over any conflicting Court Rules.  
 9 See, Hulsey Pool Co. v. Troutman, 167 Ga. App. 192, 306 SE2d 83 (1983).

10 Therefore, the Court holds that Defendant in this action has waived all notices  
 11 of the entry of this final judgment as a matter of law and that the Court will turn its  
 12 attention to the Plaintiffs' Motion for Default Judgment, Summary Judgment on the  
 issue of damages and the record in this civil proceeding.

#### 13 (a) DEFENDANT FLEETBOSTION'S ADMISSIONS

14 When the Plaintiffs served the Defendant with their Complaint for Damages  
 15 they also served the Defendant with a copy of "Plaintiffs' Request for Admissions."  
 16 See, Docket No. E4. Defendant also failed to answer the Plaintiffs' request for  
 17 admissions in this action. See, Docket No. E3. Under O.C.G.A. § 9-11-36(a) all  
 18 matters which are not denied or objected to by a Defendant shall be deemed  
 19 admitted if not denied by a Defendant within the time permitted for answering a  
 20 request for admissions. Because Defendant FleetBoston did not answer, object or  
 deny the Plaintiffs' request for admissions, the Court holds that the Defendant  
 FleetBoston made the following judicial admissions to wit:

21 "2. The Defendant FLEETBOSTION FINANCIAL  
 22 CORP., admits that it has committed all acts stated in the  
 Plaintiffs' Complaint and that all exhibits attached thereto are  
 also admitted as true."

23 "4. The Defendant FLEETBOSTION FINANCIAL  
 24 CORP., admits to the Court or the Jury that the Plaintiffs are  
 25 entitled to statutory property damages in the Complaint not  
 less than the amount of \$75,507,000.00 [Seventy-five Million

1 Five Hundred and Seven Thousand Dollars] and further  
2 waives all other defects and objections to the contrary in this  
civil action "

3 "5 The Defendant FLEETBOSTION FINANCIAL  
4 CORP , admits to the Court or the Jury that the Plaintiffs are  
5 entitled to punitive damages of not less than the amount of  
6 \$95,000,000 00 [Ninety-five Million Dollars] and further  
waives all other defects and objections to the contrary in this  
civil action "

7 "6 The Defendant FLEETBOSTION FINANCIAL  
8 CORP , admits to the Court or the Jury that Plaintiff is  
9 entitled to pre interest judgment from June 4<sup>th</sup>, 1994 until the  
date final judgment is entered and further waives all other  
defects and objections to the contrary in this civil action "

10 "8 The Defendant FLEETBOSTION FINANCIAL  
11 CORP , admits that the Plaintiffs' Complaint for damages  
12 states a legal claim to which relief can be granted by the  
13 Court and that a motion to dismiss Plaintiffs' Complaint or to  
14 set aside any final judgment under O C G A § 9-11-60(d)  
15 based upon such grounds would be without merit by the  
16 Defendant Therefore, the Complaint states a legal claim for  
17 relief and is deemed true and correct without any objections  
18 made by the Defendant."

19 "9 The Defendant FLEETBOSTION FINANCIAL  
20 CORP , admits that there are no genuine issues as to any  
21 material facts as to liability and damages and that the  
22 Plaintiffs are entitled judgment to a Summary Judgment on  
the issue of liability and damages as a matter of law and  
waives any defects or objections to the contrary "

23 "11 The Defendant FLEETBOSTION FINANCIAL  
24 CORP , admits that any amendments or withdrawal of these  
25 admissions by the Court or by the Defendant concerning the  
matters admitted would cause the Plaintiffs an undue burden  
and would be prejudice to them and the case will not be best  
served "

These un-withdrawn admissions made by the Defendant FleetBoston  
Financial Corporation are deemed judicial admissions and cannot be overlooked or  
set aside by this Court See, O C G A § 9-11-36(b) The statute reads in part that

1           “(b) Effect of admission Any matter admitted  
2           under this Code Section is conclusively established  
3           unless the court, on motion, permits withdrawal or  
4           amendment of the admission ”

5                           (b) TRIAL COURT'S DISCRETION

6           This Court will only have discretion under O.C.G.A. § 9-11-36(b) when a party  
7           moves to determine the sufficiency of the answers or objections filed in response to a  
8           request for admissions See, Mountain View Enters, Inc. v. Diversified Systems,  
9           133 Ga App 249, 211 SE2d 186 (1974) Defendant should have moved to amend  
10          or withdraw its admissions in order for this Court to use its discretion However,  
11          without such a timely motion made by the Defendant FleetBoston to withdraw or  
12          amend its admissions this Court as a matter of law is without discretion, authority or  
13          jurisdiction to set aside or amend Defendant's admissions on its own motion

14                           (c) GEORGIA'S SUPREME COURT RULE ON ADMISSION

15          This Court is also bound by the holding made by our Georgia Supreme Court  
16          in G.H. Bass & Co v Fulton County Bd Of Tax Assessors, 268 Ga 327, 486  
17          SE2d 810 (1997) holding that a Defendant's un-withdrawn admissions are deemed  
18          admitted when not denied The Georgia Supreme Court held in part that

19                       “The [Defendant] did not move the trial court to  
20                       allow the withdrawal or amendment of its admissions  
21                       either before or after [the Plaintiffs] raised the legal  
22                       effect of the [Defendant's] failure to respond to its  
23                       requests and did not offer any justification for its failure  
24                       to respond which would have authorized the trial court  
25                       to exercise its discretion under O.C.G.A. § 9-11-36(b) to  
                     relieve the [Defendant] from the consequence of its  
                     admissions Because the [Defendant] did not avail itself  
                     of any of the variety of the responses available under  
                     O.C.G.A. § 9-11-36 and chose not to seek the liberal  
                     remedies afforded to parties under the statute to avoid  
                     the consequences of a failure to respond, we hold that  
                     the subject matter of [Plaintiffs'] requests for admission  
                     stood admitted ”

                     “The language in O.C.G.A. § 9-11-36(a) is clear,  
unambiguous, and unequivocal and means just what it  
says One must comply strictly and literally with the



1 terms of the statute upon the peril of having his  
2 response construed to be an admission."

3 "While we recognize that the result on the  
4 [Defendant] may be criticized as harsh or draconian, our  
5 holding benefits both bench and bar in that it promotes  
6 constancy and stability in the law by clarifying that the  
7 plain language of a civil practice statute will be applied  
8 consistently to all parties; hence, all practitioners will be  
9 able to govern their behavior accordingly "

10 "Because the admissions were not withdrawn or  
11 amended, the Court of Appeals erred by holding that the  
12 [Defendant's] failure to respond was a matter of no  
13 consequence "

14 "Judgment reversed "

15 With emphases supplied and citations omitted Thus our Georgia Court of  
16 Appeals has echoed the Georgia Supreme Court holding in its opinions in Mays v  
17 Ed Voyles Chrysler-Plymouth, Inc , 255 Ga. App 357, 565 SE2d 515 (2002),  
18 Solis v Lamb, 244 Ga. App. 8, 534 SE2d 582 (2000) The Georgia Court of  
19 Appeals has ruled in Mays v Ed Voyles Chrysler-Plymouth, Inc , Supra, that

20 "A matter admitted in response to requests for  
21 admission under O.C.G.A. § 9-11-36 is conclusively  
22 established unless the court, on motion, permits  
23 withdrawal or amendment of the admission.... Such a  
24 solemn admission in judicio is conclusive as a matter of  
25 law on the matter stated and cannot be contradicted by  
other evidence unless it is withdrawn or amended on  
formal motion."

Because this Court has already found that the Defendant has admitted that the  
Plaintiffs are entitled to not less than \$75,507,000.00 in property damages,  
\$95,000,000.00 in punitive damages and pre judgment interest from June 4<sup>th</sup>, 1994  
until the date final judgment is entered in this civil action

The Court holds that there are no genuine issue as to any material fact  
concerning the amount of damages and that the Plaintiffs are entitled to Summary  
Judgment on the issue of damages as a matter of law See, Mays v Ed Voyles  
Chrysler-Plymouth, Inc , 255 Ga. App. 357, 565 SE2d 515 (2002)

#### IV. CONCLUSIONS OF LAW

The Court conclude that the Plaintiffs made proper service of process on Defendant FleetBoston Financial Corporation with the Summons, Complaint and Request for Admissions by serving the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1520(c) the law of this State. See, Docket No. E3

The Court further conclude that the Defendant is in default as a matter of law and that Defendant FleetBoston has legally waived all further notices in this action pursuant to O.C.G.A. § 9-11-5(a). This also includes notice of time and place of trial and the issuing of any final judgment and decree in this civil action.

The Court further conclude that the admissions made by the Defendant FleetBoston Financial Corporation as to the amount of damages are deemed judicial admissions and cannot be overlooked by this Court and is therefore binding on this Court. See, O.C.G.A. § 9-11-36(b). Because of Defendant's solemn admissions in judicio are binding, they are conclusive on the issue of damages and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion.

Therefore, the Plaintiffs are entitled to relief sought and that this Court has jurisdiction to grant the Plaintiffs' request for relief concerning their joint Motion for Default Judgment and Summary Judgment on the issue of damages in this civil action. See, Georgia Constitution, Article VI Section IV Paragraph I, O.C.G.A. § 9-11-55(a) and O.C.G.A. § 9-11-56(a).

Therefore, it is hereby

**ORDERED, ADJUDGED, AND DECREED,** That final judgment is entered in favor of the Plaintiffs Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., against the Defendant FleetBoston Financial Corporation in the amount of \$75,507,000.00 in property damages which damages are tripled pursuant to O.C.G.A. § 13-14-6(c) the (Georgia RICO Act) and 18 U.S.C. § 1964(c) the (Federal RICO Act) resulting in a total amount of **\$226,521,000.00** in favor of the Plaintiffs against Defendant FleetBoston Financial Corporation.

**IT IS FURTHER ORDERED,** That the Plaintiffs shall have punitive damages against the Defendant for its illegal actions, frauds, willful misconduct,

1 wanton, illegal thefts and RICO violations in the amount of \$95,000,000.00 in punitive  
 2 damages which damages are tripled pursuant to O.C.G.A. § 16-14-6(c) the Georgia  
 3 RICO Act and 18 U.S.C. § 1964(c) the Federal RICO Act resulting in a total amount  
 4 of **\$285,000,000.00** in favor of the Plaintiffs against Defendant FleetBoston.

5 **IT IS FURTHER ORDERED,** That the Plaintiffs shall have pre judgment  
 6 interest against the Defendant FleetBoston Financial Corporation concerning the  
 7 Plaintiffs' property damage claims from June 4<sup>th</sup>, 1994 upon entry of this judgment in  
 8 the amount of **\$410,746,265.24** pursuant to O.C.G.A. § 51-12-14(c). See, Affidavit  
 9 at Docket No. E6. Thus, the Plaintiffs shall have a total final judgment against  
 10 Defendant FleetBoston Financial Corporation in the principle amount of  
 11 **\$511,521,000.00** and pre judgment interest in the amount of **\$410,746,265.24**.

12 **IT IS FURTHER ORDERED,** That the Defendant shall pay any and all post  
 13 judgment interest that accrues on this final judgment after the entry of this final  
 14 judgment pursuant to O.C.G.A. § 7-4-12.

15 **IT IS FURTHER ORDERED,** That the Clerk of this Court shall issue a Writ  
 16 of Execution (Fi Fa) in the principle amount of **\$511,521,000.00** with interest in the  
 17 amount of **\$410,746,265.24** and the Court cost of this action. Upon the Clerk  
 18 issuing the Writ of Execution (Fi Fa), Defendant FleetBoston Financial Corporation  
 19 formerly known as BankBoston Corporation shall immediately pay and satisfy the  
 20 final judgment of this Court as stated in such Writ of Execution (Fi Fa) and upon  
 21 Defendant receiving a certified copy of this final judgment and the Writ of Execution

22 **IT IS FURTHER ORDERED,** By this Court that unless the Defendant show  
 23 good cause to this Court why it cannot pay or satisfy the final judgment of this Court  
 24 with pre judgment interest, or if the Defendant fails or refuses to make payment of the  
 25 final judgment including pre judgment interest to the Plaintiffs within 7 days upon  
 receipt of a copy this order, then the Court hereby adjudges the Defendant in civil  
 contempt of this Court. See, Griggers v. Bryant, 239 Ga. 244, 236 SE2d 599  
 (1977). Wagner v. Commercial, Inc., 203 Ga. 1, 45 SE2d 205 (1945).

1       **IT IS FURTHER ORDERED,** By this Court that the Defendant shall be  
 2 subject to pay the Plaintiff in addition to, the final judgment and post judgment  
 3 interest, a civil penalty of **\$25,000.00** per day until the Defendant purges itself of such  
 4 contempt by complying with the terms of this final judgment. See, *In re Harvey*, 219  
 5 Ga. App. 76, 464 SE2d 34 (1995). This civil penalty will only apply if the Defendant  
 6 fails to comply with the terms of this order within (7) days upon receiving notice of this  
 7 order by the Court or by the Plaintiffs. The Defendant, its subsidiaries that are  
 8 operating in this State, their officers and agents will be subject to further civil and  
 9 criminal penalties and a writ of injunction that will enjoin them from operating in this  
 10 State until Defendant has complied with the terms of this final judgment.

11       **IT IS FURTHER ORDERED,** That the Sheriffs of this State and their lawful  
 12 Deputies are hereby ordered to take all actions needed to seize all monies, property  
 13 and assets which is not exempt by law held by any persons, corporations,  
 14 partnerships, banks or holding companies held on behalf of the Defendant or that is  
 15 in the possession of the Defendant located within the jurisdiction of this State.

16       **IT IS FURTHER ORDERED,** By this Court that the Defendant shall post  
 17 supersede bonds in the amount of **\$511,521,000.00** representing the principal and  
 18 **\$410,746,265.24** representing the pre judgment interest before the Defendant can  
 19 file any pleadings, motions or appeals in this action. The Clerk of this Court is hereby  
 20 directed not to file any motions, appeal or any other documents into this Court on  
 21 behalf of the Defendant except an affidavit by the Defendant's CEO explaining why  
 22 the Defendant cannot post the supersede bonds stated in this decree. Nor shall the  
 23 Clerk of this Court set any hearings on any other matter before any other Judge of  
 24 this Court until said Defendant has posted a total of **\$922,267,265.24** in supersede  
 25 bonds with the Clerk of this Court.

1       **IT IS FURTHER ORDERED,** By this Court that the Clerk of this Court is  
 2 also directed to served a certified copy of the Writ of Execution (Fi Fa) and this final  
 3 judgment entered on the Defendant FleetBoston Financial Corporation by U.S.  
 4 Certified Mail pursuant to O.C.G.A. § 14-2-1520(c) addressed to

1 M. A. FERRUCCI, President & CEO  
2 FLEETBOSTON FINANCIAL CORPORATION  
3 c/o Cathy Cox, Secretary of State  
4 2 Martin Luther King Jr., Drive, Suite 315  
5 Atlanta, Georgia 30334-1530

6 **IT IS FURTHER ORDERED,** By this Court that the Plaintiffs shall also be  
7 authorized to perfect service of a copy of this final judgment and the Writ of Execution  
8 (Fieri Facias) on the Defendant FleetBoston Financial Corporation f/k/a BankBoston  
9 Corporation by U.S. Certified Mail at any of the other addresses of the Defendant  
10 listed in the office of the North Carolina's Secretary of State. Any service made by  
11 the Clerk of this Court or the Plaintiffs in this action pursuant to this order shall be  
12 deemed perfected on the Defendant pursuant to O.C.G.A. § 14-2-1520(c).

13 **V. BILL OF PEACE AND INJUNCTION**

14 **IT IS HEREBY ORDERED,** By this Court that the Defendant, its officers  
15 agents, its servants, its assigns and its successors (such as Bank of America) or any  
16 other person, corporation, insurance company, bank or partnership acting under the  
17 authority of the Defendant FleetBoston Financial Corporation are hereby permanently  
18 enjoined and restrained from the following

19 (a) The Defendant is hereby permanently enjoined and  
20 restrained from assisting or aid and aiding its subsidiaries, its  
21 officers, agents and servants in performing any illegal acts averred  
22 by the Plaintiffs and deemed by the Court to be illegal and a fraud  
23 against the Plaintiffs and other consumers in the State of Georgia,

24 (b) The Defendant is hereby permanently enjoined and  
25 restrained from operating in this State without a Certificate of  
Authority from the Georgia Secretary of State,

(c) The Defendant, its officers, agents and its attorneys are  
permanently enjoined and restrained committing any further torts  
against the Plaintiffs as stated in their Complaint,

(d) The Defendant, its officers, agents and its attorneys are  
hereby permanently enjoined and restrained from filing any

1 motions, pleadings or appeals for the purpose of delaying any rights  
 2 adjudicated by this Court in favor of the Plaintiffs in this civil action  
 3 Nor shall the Defendant or its attorneys acting on behalf of the  
 4 Defendant file any motions, pleadings or appeals for the purpose of  
 harassing the Plaintiffs of any rights adjudicated by the Court and

5 (e) Defendant its officers, agents and its attorneys are  
 6 hereby permanently enjoined and restrained from harassing the  
 7 Plaintiffs in any discovery or post judgment discovery matters by  
 8 asking questions in a matter which is deemed irrelevant to the case  
 9 so adjudicated by this Court or that such questions has no legal  
 10 value to the Plaintiffs' claims at issue Nor shall Defendant's  
 11 attorneys file any motions or pleadings in any other Court having  
 jurisdiction on matters already admitted to by the Defendant and  
 12 matters adjudicated by this Court in this civil action


#### 13 **VI. ENFORCEMENT PROVISIONS OF FINAL JUDGMENT**


14 **IT IS FURTHER ORDERED,** By this Court that it shall be the duty of the  
 15 Sheriffs of this State located within their legal jurisdiction where all provisions of this  
 16 final judgment can be enforced against the Defendant FleetBoston and that said  
 17 officer or officers shall take all actions and proper steps needed when requested to  
 do so by the Plaintiffs in enforcing this final judgment by performing the following

- 18 a Arrest anyone who may resisting or interfering with the  
 19 enforcement of this final judgment in the presence of such  
 officer(s) as legal contempt of this Court,
- 20 b Make any Police report and document all claims in such  
 21 report when requested by the Plaintiffs or their authorized  
 agents concerning any violations of the laws of this State
- 22 c Take possession of Defendant's assets which may be in the  
 23 legal possession of any banks, holding company,  
 corporation, partnership or insurance company and,
- 24 d Perform any other act which may aid in the enforcement of  
 25 this final judgment provided however that such act may not  
 conflict with the laws of this State

**IT IS FURTHER ORDERED,** That this final judgment shall be a standing order of this Court in the above-styled civil matter and is entered as final judgment pursuant to O.C.G.A. § 9-11-54(b) unless reversed, modified or set aside by any of the appellate Courts in this State

Hon. M. GINO BRIGDON, Presiding Judge  
SUPERIOR COURT OF FULTON COUNTY

  
Michael R. Johnson, Sr.  
Attorney for the Plaintiff  
Georgia Bar No. 395056  
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Dr. Tony L. Ware, JD, Plaintiff  
Chairman & CEO  
P.O. Box 150524-Dept. 0227  
Atlanta, Georgia 30315-0188  
(404) 945-0342

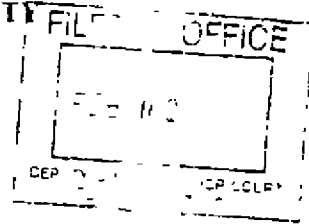




IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

TONY L. WARE, CEO, and  
T.L. WARE BOTTLING CO., INC.,

Plaintiff.



Vs.

Civil Action 2004 CV 94553  
Judge Bensonetta Tipton Lane

FLEETBOSTON FINANCIAL CORP.,  
f/k/a BANKBOSTON CORP.,

Defendant

ORDER VACATING JUDGMENT AND SETTING HEARING

The Final Judgment and Decree entered January 28, 2005, by the Presiding Judge is hereby **VACATED**. The Court will hear argument regarding the plaintiff's motion for default judgment and the scope of any appropriate relief on **Wednesday, February 16, 2005 at 10:00 A.M.** in Courtroom 1-D, 185 Central Avenue SW, Atlanta, GA 30303. This hearing is specially set. No continuances will be granted except upon written motion and for legal cause.

SO ORDERED, this 2 day of February, 2005

  
BENSONETTA TIPTON LANE, JUDGE  
Fulton Superior Court  
Atlanta Judicial Circuit

Please serve

Mr. Michael Robert Johnson  
Johnson & Associates, P.C.  
340 W. Peachtree Street, Suite 200  
Atlanta, GA 30308-3517  
Phone 404-688-7100  
Fax 404-230-2853

Dr. Tony L. Ware  
P.O. Box 150524-Dept. 0227



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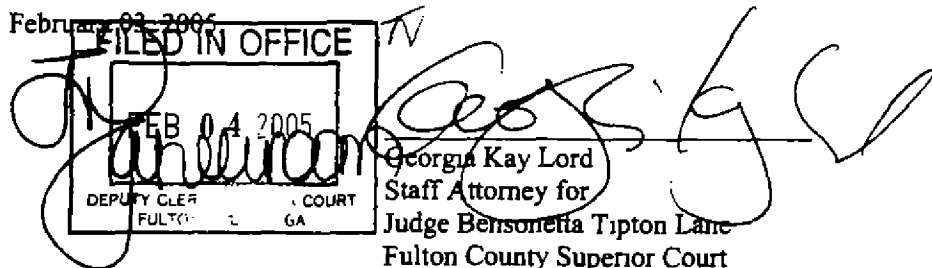
**CIVIL MOTIONS & STATUS CONFERENCE CALENDAR  
FEBRUARY 16, 2005  
JUDGE BENSONETTA TIPTON LANE**

The Court will hear argument in each of the matters listed below on **February 16, 2005, at the times listed** in Courtroom 1-D, 185 Central Avenue SW, Atlanta, GA 30303. These hearings are specially set. **Attendance is mandatory.** Unless a party has been excused from reporting for this hearing its failure to appear may result in the dismissal of its action or counterclaim for want of prosecution or in the striking of its answer. No continuances will be granted except upon written motion and for legal cause. The fact that the parties may not believe a status conference or hearing is not needed at this time does not constitute legal cause, **do not** seek to be excused from this calendar absent such factors as genuine hardship or the settlement of the underlying case. Any supplemental pleadings not previously due which the parties wish to submit in connection with this hearing must be filed by **February 14, 2005**, with a courtesy copy to the Court in chambers, in order to be considered by the Court.

The parties should be prepared to discuss the status of the case, including the following issues: a) whether there are any pending motions and, if so, if they require a hearing, b) the merits of any pending motions that are ripe for consideration, c) the status of discovery, d) whether mediation would be helpful/appropriate, and, e) when the case can be ready for trial.

All correspondence and phone inquiries regarding this calendar should be directed to Staff Attorney Georgia Lord at (Phone) 404/302-8537, (Facsimile) 404/335-2864, Chambers of Judge Bensonetta Tipton Lane, 185 Central Avenue SW, Room T-1955, Atlanta, GA 30303.

This Thursday, February 03, 2005



Copies to  
All Listed Individuals

1/1/05

<b>Time</b>	<b>Case Number</b>	<b>Case Name</b>	<b>Purpose of Hearing</b>	<b>Counsel</b>
09 30 A M	2003cv75769	Colonial Shoe Co v Kingo Shoes USA	Status Conference	<p><b>Mr. Lee S. Goldstein</b> Hassett Cohen Goldstein Port &amp; Gottlieb One Lakeside Commons, Suite 990 990 Hammond Drive Atlanta, GA 30328 Phone 770-393-0990 Fax 770-901-9417 E-Mail <a href="mailto:lgoldstein@internetlegal.com">lgoldstein@internetlegal.com</a></p> <p><b>Mr Mark David Hackett</b> <b>Mr David B. Tieman</b> Husch &amp; Eppenberger The Heritage Center 736 Georgia Ave, Suite 300 Chattanooga, TN 37402-2059 Phone 423-266-5500 Fax 423-266-5499 E-Mail <a href="mailto:mark.hackett@husch.com">mark.hackett@husch.com</a></p>
09 30 A M	2003cv79446	Microbilt Corporation v Fidelity Nat'l Financial	Status Conference, Pending Request for Extension of Discovery	<p><b>Mr Halsey George Knapp Jr</b> <b>Mr. Kevin H Hudson</b> Foltz Martin LLC Five Piedmont Center, Suite 750 Atlanta, GA 30305-1509 Phone 404-231-9397 Fax 404-237-1659</p> <p><b>Mr David Leshe Pardue</b> <b>Ms. Alycia K. Jastrebski</b> Hartman, Simons, Spielman &amp; Wood, LLP 6400 Powers Ferry Rd, N W, Suite 400 Atlanta, GA 30339-2949 Phone 770-226-1347 Fax 770-858-1095 E-Mail <a href="mailto:dpardue@hssw.com">dpardue@hssw.com</a></p>
09 45 A M	2002cv49078	Francine R Meyer and Thomas S Wickson v Steven B Waite and Elizabeth E Waite	Status Conference	<p><b>Mr. Stanley M. Lefco</b> Law Offices Stanley M Lefco P C 4651 Roswell Rd, G-602 Atlanta, GA 30342 Phone 404-843-9666 Fax 404-843-9667 E-Mail <a href="mailto:losml@aol.com">losml@aol.com</a></p> <p><b>Mr. Peter L. Lublin</b></p>

				McCalla Raymer Padrick Cobb Nichols & Clark, LLC 1544 Old Alabama Road Roswell, GA 30076-2102 Phone 770-643-7200 Fax 770-643-4062 E-Mail <a href="mailto:plh@mccalla.com">plh@mccalla.com</a>
09 45 A M	2004CV94220	THE CONCOURSE IV ASSOC VS FULTON COUNTY BOARD OF TAX ASSESSORS	Status Conference	<b>Mr Samuel W Johnson</b> Property Tax Consulting, LLC P O Box 421185 Atlanta, GA 30342-1185 Phone 404-943-0300 Fax 404-257-8770  <b>Mr Robert L. Martin</b> <b>Mr. R. David Ware</b> Fulton County Attorney's Office 141 Pryor Street, S W , Suite 4038 Atlanta, GA 30303 Phone 404-730-7750 Fax 404-730-6324 E-Mail <a href="mailto:rlmjam@mindspring.com">rlmjam@mindspring.com</a>
10 00 A M	2004cv94553	TONY L WARE, CEO, et al , v FLEET BOSTON FINANCIAL CORP f/k/a BANKBOSTON CORP	Plaintiff's Motion for Default Judgment	<b>Mr. Michael Robert Johnson</b> Johnson & Associates, P C 340 W Peachtree Street , Suite 200 Atlanta, GA 30308-3517 Phone 404-688-7100 Fax 404-688-7100  <b>FleetBoston Financial Corporation</b> c/o Mr M A Ferrucci 1209 Orange Street Wilmington, DE 19801  <b>FleetBoston Financial Corporation</b> c/o Mr M A Ferrucci, CEO 50 Kennedy Plaza, 16 <sup>th</sup> Floor Providence, RI 02903
11 30 A M	HC00324	Johnah Peterson v Timothy C Ward, Warden	Status Conference -- Habeas Corpus Petition	<b>Mr. Johnah Peterson</b> GDC # 934975 Atlanta Men's Transitional Center 332 Ponce de Leon Avenue, NE Atlanta, GA 30308  <b>Mr Daniel Melvin King Jr</b> Daniel M King, Jr , LLC P O Box 4329 Dublin, GA 31040 Phone 478-275-2255 Fax 478-275-2250

				<b>Ms. Anne Green</b> Assistant District Attorney for Fulton County 136 Pryor Street Atlanta, GA 30303 Phone 404-302-8515 Fax 404-730-5398
12 00 Noon	2003cv79080	Fulton County v 0 292 Acres of Land	Status Conferences For Cases on Feb 28th Trial Calendar	<b>Mr. Beryl Harold Weiner</b> <b>Mr. Thomas C. Dempsey</b> Weiner, Yancey, Dempsey & Diggs LLP South Tower Suite 990 1718 Peachtree St., N.W. Atlanta, GA 30309-2409 Phone 404-870-9990 Fax 404-870-9919  <b>Mr. Richard N. Hubert</b> Chamberlain Hrdlicka White Williams & Martin 191 Peachtree St., N.E., 9th Floor Atlanta, GA 30303-1747 Phone 404-659-1410 Fax 404-659-1852
12 00 Noon	2004cv81032	Comparian, Inc v The Luckie Group	Status Conferences For Cases on Feb 28th Trial Calendar	<b>Mr. John Trotti</b> The Trotti Law Firm LLC 17 Executive Park Drive, Suite 420 Atlanta, GA 30329 Phone 404-296-6002 Fax 404-420-2138 E-Mail <a href="mailto:jtrotti@trotti-law.com">jtrotti@trotti-law.com</a>  <b>Mr. John C. Pennington</b> P O Box 275 Helen, GA 30545 Phone 706-878-0033 Fax 706-878-9916 E-Mail <a href="mailto:jcppc@linkamerica.net">jcppc@linkamerica.net</a>
12 00 Noon	2004CV91417	Robert B Seamon and Pamela A Seamon vs George H Seamon	Status Conferences For Cases on Feb 28th Trial Calendar	<b>Mr. Michael P. Froman</b> 235 Peachtree Street, Suite 400 Atlanta, GA 30303-1400 Phone 404-880-9200 Fax 404-880-4662 E-Mail <a href="mailto:fromanattorney@mindspring.com">fromanattorney@mindspring.com</a>  <b>Mr. Ronald F. Degrafski, II</b> 321 Creekstone Ridge Woodstock, GA 30188

12 00 Noon	2004cv84071	Kenneth R Rogers and Wanda S Rogers F Fulton County Bd Of Tax Assessors	Status Conferences For Cases on Feb 28th Trial Calendar	<p><b>Ms. Becky W. Adelman</b> Dixon Law Firm, P C 590 Means Street, Suite 200 P O Box 93664 Atlanta, GA 30377-0664 Phone 404-892-3551 Fax 404-892-4611 E-Mail <a href="mailto:bwadelman@mindspring.com">bwadelman@mindspring.com</a></p> <p><b>Ms. Valerie Anne Ross</b> Fulton County Attorney's Office 141 Pryor Street, S W , Suite 4038 Atlanta, GA 30303 Phone 404-730-7750 Fax E-Mail <a href="mailto:rossvalerie@yahoo.com">rossvalerie@yahoo.com</a></p>
12 00 Noon	2004cv84709	Educational Visions Inc vs Hewlett Packard Company, Compaq Computer Corporation and Custom Edge Inc	Status Conferences For Cases on Feb 28th Trial Calendar	<p><b>Mr Richard J. Storrs</b> 1355 Peachtree Street, Suite 1570 Atlanta, GA 30309 Phone 404-888-9600 Fax 404-888-0996 E-Mail <a href="mailto:rstorrs@storrsllaw.com">rstorrs@storrsllaw.com</a></p> <p><b>Mr. Derek C. Abbott</b> <b>Mr Gilbert R. Saydah, Jr</b> 1201 North Market Street Wilmington, DE 19801 Phone 302-575-7357 Fax 302-425-4664</p> <p><b>Mr G. Wayne Hillis Jr</b> Parker, Hudson, Rainer &amp; Dobbs 1500 Marquis Two Tower 285 Peachtree Ctr Ave , N E Atlanta, GA 30303</p> <p>Phone 404-420-5547 Fax 404-522-8409 E-Mail <a href="mailto:whillis@phrd.com">whillis@phrd.com</a></p>
12 00 Noon	2004cv88841	Walter C Woodyard, II v Michael Glover	Status Conferences For Cases on Feb 28th Trial Calendar	<p><b>Mr Kwame Lateef Townes</b> Kwame Lateef Townes &amp; Associates, LLC P O Box 2235 Stone Mountain, GA 30086 Phone 404-964-9022 Fax 770-498-5202</p> <p><b>Mr Richard S. Alembik</b> Richard S Alembik, P C 315 West Ponce de Leon Avenue, Ste 250 Decatur, GA 30030-2433 Phone 404-373-0205 Fax 404-795-8999</p>

				E-Mail <a href="mailto:nck@alembik.com">nck@alembik.com</a>
2 00 P M	2005cv96581	WASHINGTON MUTUAL BANK, F A , vs EMBORG FOODS, USA, INC , KNUD AAGAARD- SVENDSEN and IRENA AAGAARD- SVENDSEN	Motion for Preliminary Injunction	<p><b>Mr. John E. Robinson</b>  <b>Mr. Gregory H. Blazer</b>  McLarty, Robinson &amp; Van  Voorhies  One Decatur Towncenter, Suite  330  150 E Ponce de Leon Avenue  Decatur, GA 30030-2553  Phone 404-377-6464  Fax 404-377-3658  E-Mail <a href="mailto:jer@mcrovvlaw.com">jer@mcrovvlaw.com</a></p> <p><b>Emborg Foods, USA, Inc.</b>  c/o Corporation Service  Company  40 Technology Parkway South,  #300  Norcross, GA 30092</p> <p><b>Mr. Knud Aagaard-Svendsen</b>  <b>Ms. Irena Aagaard-Svendsen</b>  110 Kiveton Park Drive  Roswell, GA 30075</p>
2 30 P M	2004cv93092	YONG CUCCIA V HYONJU YI	Request for Restraining Order	<p><b>Ms. Yong H. Cuccia</b></p> <p><b>Mrs Hyonchu Yi</b></p>
3 00 P M	2003cv68267	B Roper, LLC v Georgia Aerospace Manufacturing Systems, Inc	Status Conference and Argument on Pending Motions	<p><b>Mr. Christopher Nolan Smith</b>  130 North Crest Blvd , Suite B  Macon, GA 31210-1876  Phone 478-477-8145  Fax 478-477-7823</p> <p><b>Mr. R. Gary Spencer</b>  R Gary Spencer, P C  1800 Peachtree Street, Suite 300  Atlanta, GA 30309  Phone 404-355-9717  Fax 404-352-5636  E-Mail <a href="mailto:gary@rgaryspencer.com">gary@rgaryspencer.com</a></p>



**IN THE SUPERIOR COURT OF FULTON COUNTY**

**STATE OF GEORGIA**

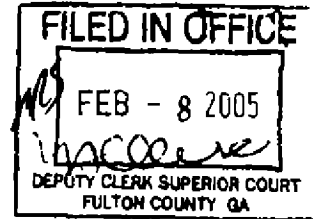
**TONY L. WARE, CEO and  
T. L. WARE BOTTLING CO., INC.,**

**Plaintiffs,**

**vs.**

**FLEETBOSTON FINANCIAL CORP.  
F/K/A BANKBOSTON CORP.**

**Defendant.**



**) CIVIL ACTION**

**) FILE NUMBER: 2004CV94553**

**NOTICE OF APPEAL**

**NOTICE OF APPEAL**

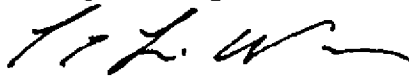
**COMES NOW, TONY L. WARE, CEO,** Plaintiff proceeding by his attorneys in the above-styled civil action matter and hereby files his Notice of Appeal pursuant to **O.C.G.A. § 5-6-34(b)** which the Plaintiff hereby appeals to the Georgia Supreme Court from final judgment entered on January 28<sup>th</sup>, 2005 and any other orders as it relates to the final judgment in this civil action

Therefore, the Clerk of this court shall please omit nothing in the record pertaining to Plaintiff's appeal Furthermore, Appellant states that there are no transcripts of evidence of the proceedings to be filed for the inclusion of the record on Plaintiff's appeal

You are required to prepare transmit the entire record on Plaintiff's appeal to the Georgia Supreme Court within (20) days from the date of filing this notice of appeal The Georgia Supreme Court has jurisdiction of this appeal rather than Georgia Court of Appeal as it involves an action concerning an injunction and equitable relief and some errors of law pursuant to **O.C.G.A. § 5-6-34(a)**. A copy of said final judgment is attached hereto as **Exhibit "A"**.

This 8<sup>th</sup>, day of Feb, 2005.

1 **Respectfully Submitted,**

2 

3 **Dr. Tony L. Ware, Appellant**

4  
5 **P.O. Box 150524-Dept. 0227**  
6 **Atlanta, Georgia 30315-0188**  
7 **(404) 945-0342**  
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**IN THE SUPERIOR COURT OF FULTON COUNTY**

**STATE OF GEORGIA**

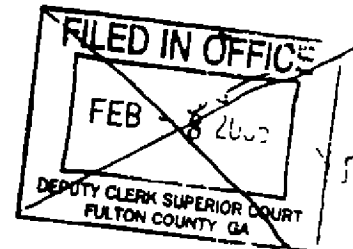
**TONY L. WARE, CEO and  
T. L. WARE BOTTLING CO., INC.,**

**Plaintiffs,**

**vs.**

**FLEETBOSTON FINANCIAL CORP.  
F/K/A BANKBOSTON CORP.**

**Defendant.**



**CIVIL ACTION**

**FILE NUMBER: 2004CV94553**

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

**COMES NOW, TONY L. WARE, CEO,** Plaintiff proceeding by his attorneys in the above-styled civil action matter and hereby certify that I have served the above-name Plaintiff **T.L. WARE BOTTLING COMPANY, INC.**, at its attorney addressed to the following.

**Michael R. Johnson, Sr., Esq.  
JOHNSON & ASSOCIATES, P.C.  
340 West Peachtree Street, N.E.**

**Suite 200**

**Atlanta, Georgia 30308**

**This** 8<sup>th</sup> **, day of** Feb **, 2005.**

**Respectfully Submitted,**

**Dr. Tony L. Ware, Appellant**



FILED IN OFFICE  
FEB - 7 2005  
DEPUTY CLERK OF COURT  
ALLEN COUNTY GA

## ORDER

## I. FINDINGS OF FACT

Page 1

After proper service of process of the Summons and Complaint on the Defendant on December 10<sup>th</sup>, 2004 by a Court Appointed Process Server, the Defendant failed to file its answer to the Summons and Complaint and became in default on January 11<sup>th</sup>, 2005.

On January 28<sup>th</sup>, 2005 this Court entered a Final Judgment and Decree in favor of the Plaintiffs. See, Docket No. 10. Before any party could appeal such final judgment this Court entered a order vacating said final judgment on its own motion without a showing of any meritorious reason. See, Docket No. 11.

Contrary to the final judgment of this Court the Order vacating the final judgment *did not state whether or not said final judgment was void or whether there were any nonamendable defects which may appear on the face of the record.* The Court further finds that the final judgment entered in this action was not void for lack of jurisdiction over the parties or the subject matter in this case. Nor are there any nonamendable defects which would authorized this Court to set aside or vacate the final judgment entered by this Court.

Thus the final judgment entered on January 28<sup>th</sup>, 2005 limited this Court's own inherent power and jurisdiction to amend, modify or set aside the final judgment as it relates to this case without first giving the Plaintiffs a notice of a hearing and a right to be heard by the Court prior to vacating and setting aside the final judgment of this Court. See, Docket No. 10 Final Judgment at Page 12.

Therefore this Court finds that as a matter of law, there are no meritorious reasons to vacate the final judgment entered on January 28<sup>th</sup>, 2005 and the Order vacating such final judgment is void on its face for lack of jurisdiction.

## **II. DISCUSSION**

Notwithstanding this Court's inherent authority over judgments within the same term of Court the final judgment entered in this action was rendered in chambers pursuant to **O.C.G.A. § 9-11-55(a)**. This Court never exercised any legal discretion to vacate its final judgment nor did the Court give the Plaintiffs any meritorious reasons for vacating the final judgment. See, Docket No. 11 Order vacating judgment. Our Georgia Supreme Court has made it clear in *Pope v. Pope*, 277 Ga. 333, 588 SE2d 736 (2003) by stating the following:

**“A trial court's discretion in setting aside a judgment will not be disturbed unless manifestly abused. However, trial Court's discretion to set aside a judgment during the term it was entered is not without limits, and should be exercised for some meritorious reason.”**

Thus the Order attempting to vacate the final judgment in this manner did not show that the Court exercised any legal discretion by showing a meritorious reason. The Georgia Supreme Court has also held in Hurt Bldg., Inc. v. Atlanta Trust Co., 181 Ga. 274, 182 SE 187 (1935) that

**“While a motion to set aside a judgment a judgment is addressed to the sound discretion of the judge, it should not, although made during the term at which the judgment was rendered, be granted unless some meritorious reason is given thereof. The rule appears to have been generally adopted in almost all jurisdictions, that the power of control even during the term should be exercised only upon sufficient cause shown, and where the matter appeals to an exercise of sound legal discretion.”**

As stated herein the final judgment entered on January 28<sup>th</sup>, 2005 limited this Court's own power and jurisdiction to amend, modify or set aside the final judgment by first giving the Plaintiffs the right to a notice of a hearing and a right to be heard prior to the Court vacating or setting aside the final judgment of this Court. See, Docket No. 10 Final Judgment at Page 12 which reads in part that:

**“IT IS FURTHER ORDERED, That the Plaintiffs has consented to the total payment and satisfaction of this judgment to be made payable to the Plaintiff T L Ware Bottling Company, Inc., by the Defendant. Furthermore, this consent final judgment shall not be amended, modified or set aside by the parties or the Court without the consent of the parties Plaintiffs or without a notice of a hearing to the Plaintiffs by the Clerk of this Court at the Plaintiffs' address of record in this action.”**

### **III. CONCLUSION OF LAW**

This provision of the final judgment was binding on this Court. Therefore, the Court concludes that there are no meritorious reasons to vacate the final judgment entered on January 28<sup>th</sup>, 2005 and the Order vacating such final judgment without notice to the Plaintiffs and without their consent pursuant to the above stated provision of the final judgment is deemed void on its face for lack of jurisdiction. The Georgia Supreme Court has further held that

**"A void judgment is no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceeding founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."**

See, Steward vs. Golden, 98 Ga. 479, 25 SE 538 (1896) and also see Shotgun vs. State, 73 Ga. App. 136, 35 SE2d 556 (1945) cert. denied, 329 U.S. 740, 67 S.Ct. 56, 91 L.Ed. 638 (1946). See, O.C.G.A. § 9-11-60(a) and O.C.G.A. § 9-12-16. The Georgia Supreme Court has made it clear by stating:

**"When a party has been afforded an opportunity to be heard, the court cannot suspend or vacate its judgment merely to let in a defense which should have been offered before the judgment was entered."**

See, Hurt Bldg., Inc. v. Atlanta Trust Co., Supra. This Court further concludes that the Order vacating the final judgment without having a meritorious reason and without notice to the Plaintiffs prior to vacating the final judgment violates the Plaintiffs Federal Constitutional rights to due process under law.

**ORDERED, ADJUDGED, AND DECREED,** That the Order vacating the final judgment entered on February 2<sup>nd</sup>, 2005 is hereby set aside and vacated and said order is deemed null and void on its face for lack of jurisdiction and because of a nonamendable defect which appears on the face of the record such as lack of notice of a hearing to the Plaintiffs concerning the Court's own motion to vacate the final judgment without having a meritorious reason.



**IT IS FURTHER ORDERED,** By this Court that the final judgment entered on January 28<sup>th</sup>, 2005 by the Honorable M. Gino Brogdon is effective and binding on this Court and all parties and is therefore the law of this case

**IT IS FURTHER ORDERED,** By this Court that the Defendant and the Clerk of this Court is further directed to comply with all of the terms of the final judgment entered on January 28<sup>th</sup>, 2005 by the Honorable M. Gino Brogdon, Presiding Judge and that any further orders or judgments (except any orders of the Georgia Supreme Court or the Georgia Court of Appeals) which is entered in violation of the final judgment shall be deemed null and void as a matter of law

**IT IS FURTHER ORDERED,** By this Court that this order shall be made part of the final judgment of this Court and shall not be vacated or set aside by the Court without prior notice of a hearing to the Plaintiffs. The Plaintiffs shall have a right to file a motion for contempt for any persons violating this Order and the final judgment entered on January 28<sup>th</sup>, 2005 by this Court.

**IT IS SO ORDERED, This** 7 **day of** Feb, 2005.

  
**Hon. JERRY W. BAXTER, Presiding Judge**  
**SUPERIOR COURT OF FULTON COUNTY**

**IT IS HEREBY CONSENTED TO BY THE PARTIES,**

**Consented to By:**



**Michael R. Johnson, Sr.**  
**Attorney for the Plaintiff**  
**Georgia Bar No. 395056**  
**Johnson & Associates, P. C.**  
**340 West Peachtree Street, N.E.**  
**Suite 200**  
**Atlanta, Georgia 30308**  
**(404) 688-7100**

**Consented to By:**



**Dr. Tony L. Ware, JD, Plaintiff**  
**Chairman & CEO**  
**P.O. Box 150524-Dept. 0227**  
**Atlanta, Georgia 30315-0188**  
**(404) 945-0342**



I

1 **IN THE SUPERIOR COURT OF FULTON COUNTY**

2 **STATE OF GEORGIA**

3

4 **TONY L. WARE, CEO and**

5 **T. L. WARE BOTTLING CO., INC.,**

6 **Plaintiffs,**

7 **vs.**

8 **FLEETBOSTON FINANCIAL CORP.**

9 **F/K/A BANKBOSTON CORP.**

10 **Defendant.**

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**) CIVIL ACTION**

**) FILE NUMBER: 2004CV94553**

**) MOTION TO SET ASIDE ORDER**

11

12 **MOTION TO SET ASIDE ORDER**

13 **COMES NOW, TONY L. WARE, CEO and T.L. WARE BOTTLING**

14 **COMPANY, INC.,** the Plaintiffs and files their Joint Motion to Set Aside Order

15 entered on February 2<sup>nd</sup>, 2005 as void and lack of notice pursuant to O.C.G.A. § 9-11-

16 **60(a) and (d)(1)(3) against the above-named Defendant FLEETBOSTON**

17 **FINANCIAL CORPORATION.** Based upon the record in this action, the

18 Defendant's admissions and applicable State, the Plaintiffs is entitled to judgment as

19 a matter of law The Plaintiffs shows the Court the following

20 **I. STATEMENT OF FACTS**

21 The Plaintiffs Tony L Ware, CEO and T L Ware Bottling Company, Inc ,

22 brought this civil action on December 7<sup>th</sup>, 2004 based upon their ten count Complaint

23 for Damages, Injunction, RICO violations, Fraud, Gross Negligence and other

24 violations of both Federal and State laws and further requesting injunctive and other

25 equitable relief concerning all other claims and disputes against the Defendant

FleetBoston Financial Corporation f/k/a/ BankBoston Corporation

1 After proper service of process of the Summons and Complaint on the  
2 Defendant on December 10<sup>th</sup>, 2004 by a Court Appointed Process Server, the  
3 Defendant failed to file its answer to the Summons and Complaint and became in  
4 default on January 11<sup>th</sup>, 2005

5 On January 28<sup>th</sup>, 2005 this Court entered a Final Judgment and Decree in  
6 favor of the Plaintiffs See, Docket No 10 Before any party could appeal such final  
7 judgment this Court entered a order vacating said final judgment on its own motion  
8 without a showing of any meritorious reason See, Docket No 11

9 Contrary to the final judgment of this Court the Order vacating the final  
10 judgment did not state whether or not said final judgment was void or whether there  
11 were any nonamendable defects which may appear on the face of the record The  
12 Plaintiffs further avers that the final judgment entered in this action was not void for  
13 lack of jurisdiction over the parties or the subject matter in this case Nor are there  
14 any nonamendable defects which would authorized this Court to set aside or vacate  
15 the final judgment entered by this Court

16 Thus the final judgment entered on January 28<sup>th</sup>, 2005 limited this Court's own  
17 inherent power and jurisdiction to amend, modify or set aside the final judgment as it  
18 relates to this case without first giving the Plaintiffs a notice of a hearing and a right to  
19 be heard by the Court prior to vacating and setting aside the final judgment of this  
20 Court See, Docket No 10 Final Judgment at Page 12

21 Therefore Plaintiffs avers that as a matter of law, there are no meritorious  
22 reasons to vacate the final judgment entered on January 28<sup>th</sup>, 2005 and the Order  
23 vacating such final judgment is void on its face for lack of jurisdiction

## 24 **II. DISCUSSION**

25 Notwithstanding this Court's inherent authority over judgments within the same  
term of Court the final judgment entered in this action was rendered in chambers  
pursuant to O.C.G.A. § 9-11-55(a) This Court never exercised any legal discretion  
to vacate its final judgment nor did the Court give the Plaintiffs any meritorious  
reasons for vacating the final judgment See, Docket No 11 Order vacating

1 judgment Our Georgia Supreme Court has made is clear in Pope v. Pope, 277 Ga.  
2 333, 588 SE2d 736 (2003) by stating the following

3 "A trial court's discretion in setting aside a  
4 judgment will not be disturbed unless manifestly  
5 abused. However, trial Court's discretion to set aside  
6 a judgment during the term it was entered is not  
7 without limits, and should be exercised for some  
8 meritorious reason."

9 Thus the Order attempting to vacate the final judgment in this manner do not  
10 show that the Court exercised any legal discretion by showing a meritorious reason  
11 The Georgia Supreme Court has also held in Hurt Bldg., Inc. v. Atlanta Trust Co.,  
12 181 Ga. 274, 182 SE 187 (1935) that

13 "While a motion to set aside a judgment a  
14 judgment is addressed to the sound discretion of the  
15 judge, it should not, although made during the term at  
16 which the judgment was rendered, be granted unless  
17 some meritorious reason is given thereof. The rule  
18 appears to have been generally adopted in almost all  
19 jurisdictions, that the power of control even during  
20 the term should be exercised only upon sufficient  
21 cause shown, and where the matter appeals to an  
22 exercise of sound legal discretion."

23 As stated herein the final judgment entered on January 28<sup>th</sup>, 2005 limited this  
24 Court's own power and jurisdiction to amend, modify or set aside the final judgment  
25 by first giving the Plaintiffs a notice of a hearing and a right to be heard before the  
Court before vacating or setting aside the final judgment of this Court See, Docket  
No 10 Final Judgment at Page 12 which reads in part that

26 "IT IS FURTHER ORDERED, That the Plaintiffs  
27 has consented to the total payment and satisfaction of this  
28 judgment to be made payable to the Plaintiff T L Ware  
29 Bottling Company, Inc., by the Defendant Furthermore,  
30 this consent final judgment shall not be amended,  
31 modified or set aside by the parties or the Court  
32 without the consent of the parties Plaintiffs or without  
33 a notice of a hearing to the Plaintiffs by the Clerk of  
34 this Court at the Plaintiffs' address of record in this  
35 action."

### III. ARGUMENT AND CITATION OF AUTHORITY

This provision of the final judgment was binding on this Court. Therefore, the Plaintiffs concludes that there are no meritorious reasons to vacate the final judgment entered on January 28<sup>th</sup>, 2005 and the Order vacating such final judgment without notice to the Plaintiffs and without their consent pursuant to the above stated provision of the final judgment is deemed void on its face for lack of jurisdiction. The Georgia Supreme Court has further held that

"A void judgment is no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceeding founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."

See, Steward vs. Golden, 98 Ga. 479, 25 SE 538 (1896) and also see Shotgun vs. State, 73 Ga. App. 136, 35 SE2d 556 (1945) cert denied, 329 U.S. 740, 67 S.Ct. 56, 91 L.Ed 638 (1946). See, O.C.G.A. § 9-11-60(a) and O.C.G.A. § 9-12-16. The Georgia Supreme Court has made it clear by stating

"When a party has been afforded an opportunity to be heard, the court cannot suspend or vacate its judgment merely to let in a defense which should have been offered before the judgment was entered."

See, Hurt Bldg., Inc. v. Atlanta Trust Co., Supra. This Court further concludes that the Order vacating the final judgment without having a meritorious reason and without notice to the Plaintiffs prior to vacating the final judgment violates the Plaintiffs Federal Constitutional rights to due process under law.

**WHEREFORE**, The Plaintiffs hereby prays and demands that this Court enter an ORDER setting aside and vacating the order of February 2<sup>nd</sup>, 2005 for lack of jurisdiction and notices the Plaintiffs as a matter of law. The Plaintiffs request that the Court further grant the following relief to wit:

1. That the Court set aside and vacate the final judgment entered on February 2<sup>nd</sup>, 2005 which is deemed null and void on its face for lack of

1 jurisdiction and because of a nonamendable defect which appears on the face  
2 of the record such as lack of notice of a hearing to the Plaintiffs concerning the  
3 Court's own motion to vacate the final judgment without having a meritorious  
4 reason

5 2 That the final judgment entered on January 28<sup>th</sup>, 2005 by the  
6 Honorable M Gino Brogdon be effective and binding on this Court and all  
7 parties and is therefore the law of this case

8 3 That the Defendant and the Clerk of this Court be directed to comply  
9 with all of the terms of the final judgment entered on January 28<sup>th</sup>, 2005 by the  
10 Honorable M Gino Brogdon, Presiding Judge and that any further orders or  
11 judgments (except any orders of the Georgia Supreme Court or the Georgia  
12 Court of Appeals) which is entered in violation of the final judgment shall be  
13 deemed null and void as a matter of law and,

14 4 That this order shall be made part of the final judgment of this Court  
15 and shall not be vacated or set aside by the Court without prior notice of a  
16 hearing to the Plaintiffs Furthermore, the Plaintiffs shall have a right to file a  
17 motion for contempt for any persons violating this Order and the final judgment  
18 entered on January 28<sup>th</sup>, 2005 by this Court

19 This 7<sup>th</sup>, day of Feb, 2005.

20 **Agreed and Consented to By:**

21 

22 **Michael R. Johnson, Sr.**  
23 **Attorney for the Plaintiff**  
24 **Georgia Bar No. 395056**  
25 **Johnson & Associates, P. C.**  
**340 West Peachtree Street, N.E.**  
**Suite 200**  
**Atlanta, Georgia 30308**  
**(404) 688-7100**

**Agreed and Consented to By:**



**Tony L. Ware, JD, Plaintiff**  
**Chairman & CEO**  
**1033 Kipling Street S.E.**  
**Atlanta, Georgia 30315-7030**  
**(404) 945-0342**

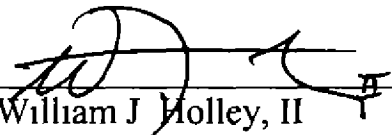
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing **NOTICE OF REMOVAL OF CIVIL ACTION** upon all parties to this matter by causing to be deposited in the U.S. Mail, proper postage prepaid, a true copy of same addressed as follows:

Michael R. Johnson, Sr (**also served via courier**)  
Johnson & Associates, P C.  
340 West Peachtree Street, N.E  
Suite 200  
Atlanta, Georgia 30308

Dr. Tony L. Ware, PhD, JD  
Post Office Box 150524 - Dept 0227  
Atlanta, Georgia 30315

This 15<sup>th</sup> day of February, 2005.

  
\_\_\_\_\_  
William J. Holley, II